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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-HQ-ES-2021-0033; FF09E41000 234 FXES111609C0000]

RIN 1018–BF98

Endangered and Threatened Wildlife and Plants; Designation of Experimental Populations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish Wildlife Service (Service), revise the regulations concerning experimental populations of endangered species and threatened species under the Endangered Species Act. We remove language generally restricting the introduction of experimental populations to only the species' "historical range" to allow for the introduction of populations into habitat outside of their historical range for conservation purposes. To provide for the conservation of certain species, we have concluded that it may be increasingly necessary and appropriate to establish experimental populations outside of their historical range if the species' habitat has undergone, is undergoing, or is anticipated to undergo irreversible decline and is no longer capable of supporting the species due to threats such as climate change or invasive species. We added language that the Secretary will also consider any adverse effects that may result to the ecosystem from the experimental population being established. We also made minor changes to clarify the existing regulations; these minor changes do not alter the substance or scope of the regulations.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Public comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available on the internet at *https://www.regulations.gov* in Docket No. FWS-HQ-ES-2021-0033.

FOR FURTHER INFORMATION CONTACT: Elizabeth Maclin, Chief, Division of Restoration and Recovery, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2646. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

The purposes of the Endangered Species Act (ESA; 16 U.S.C. 1531 et seq.) are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the ESA states that it is the policy of Congress that Federal agencies shall seek to conserve threatened and endangered species and use their authorities to further the purposes of the ESA (16 U.S.C. 1531(c)(1)). The ESA's implementing regulations are found in title 50 of the Code of Federal Regulations (CFR).

The 1982 amendments to the ESA added section 10(j) to facilitate reintroductions of listed species by allowing the Service to designate "experimental populations." The regulations to carry out section 10(j) provide that the Service may designate as an experimental population a population of an endangered species or a threatened species that will be released into suitable natural habitat outside the species' current natural range (but within its probable historical range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed) (50 CFR 17.81). At the time the Service

adopted these regulations, we did not anticipate the impact of climate change on species and their habitats. We have since learned that climate change is causing, or is anticipated to cause, many species' suitable habitat to shift outside of their historical range.

The 2021 National Fish, Wildlife, and Plants Climate Adaptation Network's Climate Adaptation Strategy report summarizes impacts to species' behavior, morphology, and physiology, as well as shifts in ranges and demographic and population-level impacts from climate change (NFWPCAN, 2021, pp. 15–20). In chapter 7 of the Fourth National Climate Assessment (Lipton et. al., 2018, p. 269), one of the key messages states, "Climate change continues to impact species and populations in significant and observable ways. Terrestrial, freshwater, and marine organisms are responding to climate change by altering individual characteristics, the timing of biological events, and their geographic ranges. Local and global extinctions may occur when climate change outpaces the capacity of species to adapt." A recent paper looked at Big Pine Key, Florida, as a case study in examining how to incorporate current scientific knowledge about regional climate projections in Service analyses. The authors examined the anticipated future effects of sea-level rise on existing habitat from saltwater intrusion of the freshwater lens below Big Pine Key. They stated that, beyond 3 ft (0.9 m) of sea-level rise, few adaptation options are available for the Florida Key deer beyond relocations outside of the Florida Keys (Miller and Harwell, 2022, p. 14553). Thus, it is clear that climate change is presently affecting—and will continue to affect—species and their habitats, and that tools such as the establishment of experimental populations outside of their historical range will become increasingly important for the conservation and recovery of ESA-listed species.

In addition to climate change, other threats such as invasive species may also reduce the ability of habitat to support experimental populations within the species' historical range. For example, both the Guam rail and Guam kingfisher (sihek) no longer have any habitat within their historical range that is suitable for reintroduction or establishment of an experimental population. The primary cause of the rail's and sihek's extinction in the wild was predation by the introduced

brown tree snake (54 FR 43966, October 30, 1989; USFWS 2008, p. 21). Applying the current section 10(j) regulations, the Service's Director determined that each was an extreme case and found that the primary habitat of the species within its historical range had been unsuitably and irreversibly altered or destroyed. For the rail, we finalized the establishment of an experimental population on the island of Rota, and for the sihek we recently published a final rule to establish an experimental population on Palmyra Atoll; both locations are outside the historical range for these species (54 FR 43966, October 30, 1989; 88 FR 19880, April 4, 2023).

Therefore, we have determined that it may be necessary and appropriate to establish experimental populations outside of a species' historical range to provide for its conservation and adaptation to the habitat-related impacts of climate change and other threats. On June 7, 2022, we proposed to revise the section 10(j) regulations at 50 CFR part 17, subpart H (87 FR 34625), and in this final rule we discuss the comments we received during the comment period and our consideration of the issues raised.

This Rulemaking Action

The regulatory changes in this final rule more clearly establish the authority of the Service to introduce experimental populations of listed species into areas of habitat outside of their historical ranges. Removing this restriction – that the Service may only consider designating an experimental population outside a species' historical range if the species' primary habitat has been unsuitably and irreversibly altered or destroyed – will allow the Service to act before populations are severely depleted, lose important elements of genetic diversity, or become habituated to captivity and may help to prevent species extinctions. Being able to act before situations are so dire that there is no remaining suitable habitat within the historical range will improve the likelihood of species recovery while reducing the need for costly and extreme measures.

When introducing experimental populations outside of historical range, we must avoid adversely affecting the ecosystem into which the population is being introduced. Our practice is

to follow the International Union for Conservation of Nature (IUCN) Guidelines for Reintroductions and Other Conservation Translocations, which recommends conducting ecological risk assessments where appropriate. As part of this final rule, we added language stating that we will consider any possible adverse effects to the ecosystem that may result from the establishment of the experimental population. Other regulatory revisions included in this final rule do not change the process for designating an experimental population.

In this rule, we finalize the proposed revisions at 87 FR 34625 (June 7, 2022) to the regulations at 50 CFR part 17, subpart H. The primary revision was to delete the reference to a species' "historical range." This change allows for experimental populations to be introduced into habitat outside of the historical range of the species under appropriate circumstances. Those circumstances could include instances where little to no habitat remains within the historical range of a species or where formerly suitable habitat within the historical range has undergone, is undergoing, or is anticipated to undergo irreversible decline or change, such that it no longer contains the resources necessary for survival and recovery, thereby leading to the need to establish the species in habitat in areas outside the historical range. Circumstances could also include instances where, based on the best available scientific information, we anticipate that the historical range will no longer contain habitat capable of supporting the recovery of the species. This rule will be applied to future designations and will not require the reevaluation of any prior designation of an experimental population.

Changes from the Proposed Rule

Based on comments we received on the proposed rule (87 FR 34625, June 7, 2022), and to provide clarifications, we include the changes described below to the proposed regulations. Other than these revisions, we are finalizing the rule as proposed:

1. In the regulation at 50 CFR 17.81(a), we removed the proposed reference to "one or more life history stages." We determined that this language was confusing and did not communicate our intent that, in order to designate an experimental population outside the

historical range, we must determine that there is habitat capable of supporting that experimental population. In considering this change we also decided it would be appropriate to change "that is necessary to support" to "that is capable of supporting."

2. In § 17.81(a), we also revised "that has been or will be released" to "that will be released" as the proposed language implied that we can retroactively designate already introduced populations, which we cannot do.

3. To § 17.81(b), we revised proposed § 17.81(b)(4) for clarity by adding "experimental" before "population" in the first part of the sentence. We also added a new subparagraph (b)(5) to ensure that, when establishing an experimental population outside of the species' historical range, we consider whether establishing such a population will adversely affect the ecosystem in the area where the experimental population would be established.

4. We revised proposed § 17.81(c)(3) to address the possibility that removal of the experimental population may be necessary by adding the word "remove" to the sentence. In the past, we have recognized that removal may be needed, and this addition explicitly recognizes that possibility.

5. We clarified and revised proposed § 17.81(d) by changing the word "acts" to "actions."

Summary of Comments and Responses

In our proposed rule to revise the regulations for establishing experimental populations published on June 7, 2022 (87 FR 34625), we requested public comments. By the close of the public comment period on August 8, 2022, we received just under 570 public comments on our proposed rule. We received comments from a range of sources including individual members of the public, States, Tribes, industry organizations, legal foundations and firms, and environmental organizations. Just under half of the comments received (253) were nearly identical statements from individuals indicating their general support for the proposed changes to the regulations but not containing substantive content. In addition, more than 50 identical comments generally

indicated they did not support the proposed changes, and several stated general concern over impacts to private agricultural lands. The remaining comments were unique and raised substantive issues.

We reviewed and considered all public comments prior to developing this final rule. Summaries of substantive comments and our responses are provided below. We combined similar comments where appropriate. We did not, however, consider or respond to comments that are not relevant to or are beyond the scope of this particular rulemaking action.

Comment 1: Several commenters stated that the proposed rule conflicts with the 2018 United States Supreme Court decision in *Weyerhaeuser Co.* v. *United States Fish and Wildlife Service*, 139 S. Ct. 361, 372 (2018). These commenters asserted that the court ruled that areas that are not habitat cannot be designated as critical habitat, even though at one time the area in question served as habitat for the species. They further stated that if habitat cannot be designated as critical habitat under the ESA, neither can land be designated as critical habitat if it was never part of the historical range of the species and never served as habitat for the species.

Response: Nothing in these 10(j) regulation revisions changes the processes or regulations for designating critical habitat. Establishment of an experimental population does not designate critical habitat or require that any areas be designated as critical habitat. In accordance with these revised 10(j) regulations, critical habitat for experimental populations may be designated only for those experimental populations that we determine to be essential to the conservation of the species. We cannot designate critical habitat for nonessential experimental populations. In addition, we would not establish an experimental population in areas of habitat that would not support that population. For some species, areas that were not part of the species' historical range are now capable of supporting a population because of climate change, and those areas can now serve as habitat for that species. Consistent with *Weyerhaeuser*, we will designate as critical habitat only areas that are habitat for the given listed species, and we will make that determination based on the best available science for the particular species, the statutory

definition of "critical habitat," our implementing regulations, and existing case law (87 FR 37757 at 37759, June 24, 2022).

Comment 2: A few commenters stated that we should retain the following sentence that we proposed to delete from § 17.81(f): "In those situations where a portion or all of an essential experimental population overlaps with a natural population of the species during certain periods of the year, no critical habitat shall be designated for the area of overlap unless implemented as a revision to critical habitat of the natural population for reasons unrelated to the overlap itself." One commenter asserted that this sentence contains an important clarification. Another commenter also asserted that retaining this sentence provides assurance to private landowners that the expanded areas for potential release will not be used to expand designation of critical habitat.

Response: We have retained the proposed deletion in this final rule. We will not designate critical habitat for nonessential experimental populations. In designating critical habitat for essential experimental populations, we will follow section 4 of the ESA and the regulations and policies for critical habitat designations.

Comment 3: A few commenters stated that the recent repeal of the 2020 final rule that established the definition of "habitat" for designating critical habitat under the ESA is a concern. The commenters asserted that the lack of a regulatory definition for habitat adds to the uncertainty and subjectivity that will result when the Service designates experimental populations.

Response: When we are analyzing whether and where to establish an experimental population, we look at whether the habitat is suitable to support that population and if the establishment of the population will be successful. This analysis is species-specific and is based on the best available scientific information. However, the evaluation of whether habitat in the experimental population area is suitable to support the species is distinct from a critical habitat

designation, which is accomplished through a separate rulemaking process. Again, we cannot designate critical habitat for nonessential experimental populations.

Comment 4: A commenter recommended the Service revise the proposed rule to clarify that impacts to nonessential experimental populations that have been introduced outside the species' historical range will not trigger consultation obligations under section 7 of the ESA. The commenter asserted that while such a provision would not meaningfully alter the trajectory of the species, it could make a critical difference in the Biden-Harris Administration's goal of expediently delivering clean energy on a large scale.

Response: Section 10(j) of the ESA already provides for reduced or streamlined section 7 procedures for experimental populations. For nonessential experimental populations, except for those occurring on National Park Service (NPS) lands or the National Wildlife Refuge System (NWRS), the less formal conferencing process applies rather than the standard consultation process requirements. Conferencing is an important tool to ensure that impacts do not jeopardize the continued existence of the species because the need to conference is based on an analysis of the combined populations of the listed species, whether or not any are designated as a nonessential experimental population.

Comment 5: A commenter expressed concern over the proposed revision requiring section 7 consultation to occur on experimental populations outside of historical habitat. The commenter stated that this proposed requirement would be onerous, lacks regulatory certainty for the regulated community, and stated is not clear how existing projects and land uses would be impacted should they now be required to undergo section 7 consultation where they previously did not because of being in non-occupied areas.

Response: It is true that if we designated an experimental population outside of historical range, the section 7 consultation requirements would apply. For nonessential experimental populations, we would treat the population as a species proposed for listing (except within NWRS or NPS land, where such populations are treated as threatened species) and follow the

more informal conferencing process, and for essential experimental populations we would follow the standard consultation process. Conferencing is required only when a proposed action is likely to jeopardize the continued existence of a species proposed for listing or destroy or adversely modify proposed critical habitat. We do not anticipate that there would be many circumstances where we would determine that a project affecting a nonessential experimental population is likely to jeopardize the listed species. Existing projects and land uses may not necessarily be affected if there is no further Federal nexus to those projects or land uses; when considering whether to establish an experimental population, whether within or outside historical range, we will coordinate closely with any affected entities.

Comment 6: One commenter stated that where the Service elects to promulgate an ESA section 10(j) rule prohibiting take of experimental populations, the Service should establish a blanket exception for incidental take of nonessential experimental populations introduced outside the species' historical range. The commenter further asserted that otherwise, ESA section 10(j) rules prohibiting take outside of historical ranges would introduce unnecessary uncertainty for the construction and/or operation of renewable energy and transmission and distribution projects. Another commenter suggested that the Service should recognize that the "blanket 4(d) rule" does not apply to experimental populations and should further create a blanket exception to the take prohibition for nonessential experimental populations located outside the species' historical range.

Response: All experimental populations are treated as if they were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the ESA. This provision allows the Service to devise those prohibitions and exceptions necessary to provide for the conservation of the species rather than provide the full prohibitions that would apply for an endangered species. If we reinstate the blanket 4(d) rule, we will not consider using it for an experimental population in the future, and we are not establishing a blanket exception for incidental take that would apply to all 10(j) populations because we conclude that each situation

is unique and requires careful consideration of what prohibitions may be necessary to apply to the experimental population; creating a blanket exception to the take prohibition for a nonessential designation would not provide the flexibility that is needed to further the conservation of the species. When we establish an experimental population, we propose a species-specific rule that outlines any prohibitions that will apply to that species' experimental population. Throughout this process we work with any entities that may be affected by the establishment of the experimental population to address any concerns about how the population may affect any ongoing or future renewable energy projects.

Comment 7: One commenter suggested that the Service should explicitly recognize the value of mitigation in areas outside a species' historical range. The commenter stated that, should the Service finalize the proposed rule, there will be regulatory confirmation that the agency believes areas outside a species' historical range can serve valuable conservation purposes (e.g., as different areas become able to support a life stage due to the effects of climate change or other factors). Where the Service has introduced an experimental population outside the species' historical range, the commenter asserted that the agency should also allow the proponents of projects having impacts to the species within the historical range to provide compensatory mitigation in areas outside the historical range in which the Service has introduced the experimental population.

Response: Fulfilling the Service's mission and recovering species requires all available conservation tools, potentially including compensatory mitigation in an area with an introduced experimental population. Any such decision will be species- and situation-specific, and we will make the decision in the context of recovery and landscape-level planning and will follow our current regulations and policies for section 10(j) and compensatory mitigation.

Comment 8: A commenter stated that we are revising the current 10(j) regulations to interpret the statute as making it discretionary rather than mandatory to use the best available science to determine whether the release will further the conservation of the species. The

commenter further stated that FWS should explicitly state that it is changing the language to reflect a changed interpretation or policy instead of doing it tacitly and without acknowledging it.

Response: We have not proposed or finalized any revisions to the 10(j) regulations that change the requirement to use the best scientific and commercial data available when considering whether to establish an experimental population. See 50 CFR 17.81(b). Regardless of whether an experimental population is within or outside the historical range of the species, the Service must still find, based on the best scientific and commercial data available, that the experimental population will further the conservation of the species.

Comment 9: Several commenters stated that the criteria we used to justify the proposed rule are vague, nonspecific, and undefined. They suggested that the proposed rule does not state to what degree a species' habitat needs to suffer such damage before this new authority could be invoked. The commenters asserted that this criterion also fails to meet the standard of objective science-based decision-making that the Service is required by the ESA to meet. Another commenter requested that we reemphasize the importance of conserving nonexperimental populations in place wherever possible. This commenter stated that only non-development-related pressures (e.g., threats that are impossible to abate through protection of originally designated critical habitat, like climate change) should be considered as appropriate reasons to establish experimental populations of rare plants outside of their historical range.

Response: Conserving nonexperimental populations is important to the recovery of species; however, for some species, establishing experimental populations may be necessary to advance their recovery. Defining what specific type of threats are "appropriate circumstances" is not necessary or advisable because they will vary by species, their habitat needs, habitat availability, and threats to the species and any definition may fail to acknowledge all circumstances under which establishing an experimental population is appropriate. However, in the preamble of this final rule we further explained, in general terms, when we might establish an experimental population outside of its historical range. Additionally, the regulations at 50 CFR

17.81(b) and (c) do outline required elements that we must consider or provide in any specific experimental population regulation. Regardless of whether an experimental population designation is within or outside of a species' historical range, it must be based on the best available science and further the conservation of the species.

Comment 10: One commenter indicated that clarity is needed to ensure that an experimental population designation can be applied even when releases have already been conducted, regardless of the date of such releases. Another commenter stated that the regulation change should not be limited to new introductions and that the Service should reevaluate and update prior designations to comply with this change. The commenters stated that not doing a reevaluation would penalize existing experimental populations that could benefit significantly by being introduced or allowed to expand outside their "historical range" as it was defined when they were listed.

Response: We cannot designate a population as experimental if that population was already released and not as an experimental population; we stated in the proposed rule, and further clarified in this final rule, that these regulations would not apply retroactively. However, it is possible that we may consider establishing additional experimental populations for species that already have an experimental population and could at that time consider whether to establish one or more populations outside of the species' historical range. Requirements for periodic review of the effects of experimental populations on the recovery of the species (§ 17.81(c)(4)), as well as the requirement to review the status of a species under section 4(c)(2) of the Act (5-year status reviews) provide mechanisms to evaluate and adjust our recovery programs for individual species.

Comment 11: A commenter stated that, rather than designating experimental populations, the Service should find landscapes where a listed species is thriving and prohibit changes to the management and maintain the current uses of that land until the species recovers. The

commenter further stated that the Service should seek to copy and apply that management to similar lands within the species' natural range where the species has been extirpated.

Response: Conserving populations within their current range is important to the recovery of listed species, and establishing experimental populations is one of the tools we use to help achieve that goal. However, in some circumstances, such as when climate change or invasive species have altered the habitat within the current range so that it is no longer capable of supporting the species, establishing experimental populations outside of a species' historical range is also an important recovery tool.

Comment 12: One commenter recommended that the Service, in collaboration with the National Marine Fisheries Service (NMFS), quickly, expeditiously, and with stakeholder involvement develop comprehensive guidance as to translocation decision-making. The commenter stated that, where potential translocations of listed species may promote conservation, that guidance should help decision-makers at the Services answer translocation questions.

Response: While overarching guidance on translocations is important, at this time we will not be developing such guidance with NMFS. We have, however, recommended that our field and regional offices follow the IUCN reintroduction guidelines, which serves this purpose.

Comment 13: One commenter suggested that we reference the IUCN reintroduction guidelines in regulation and specifically mentioned our internal memo recommending the use of the guidelines.

Response: While the IUCN guidelines are important in guiding introductions and we have communicated that information to our staff in our regions and field offices, we do not find it is necessary to reference them in these regulations. Because the best available science and guidance may change over time, it is unwise to reference a specific set of guidelines in our regulations. Instead, our regulations at § 17.81(b) include the direction to "use the best scientific and commercial data available."

Comment 14: A commenter urged us to add terminology to 50 CFR part 17 or the preamble to this rulemaking that reflects the importance of and need for connectivity between current and reintroduced populations, and between historical and newly suitable habitats.

Response: While connectivity between populations is very important, the 1982 amendments to the ESA and our regulations for experimental populations require that the experimental population must be geographically separate from other populations of that species. Where populations will not be geographically separate, or where the goal is to promote connectivity of populations, tools such as safe harbor agreements or recovery permits, rather than designation of experimental populations under section 10(j) of the Act, may be more appropriate.

Comment 15: Several commenters note that the Service has recognized that invasive species can pose a threat to species within their historical range. The commenters also stated that establishing experimental populations of endangered species outside of the species' historical range also, like invasive species, has the potential to disrupt the ecosystem in the introduced range such that it impacts native and/or threatened or endangered species. They further asserted that establishing a population outside of its historical range could have myriad unforeseeable and unintended consequences to other native wildlife species and native plant communities.

Response: Invasive species do pose threats to many species, and we would need to carefully consider whether an experimental population established outside of its historical range could itself become an invasive species. While we think this scenario is unlikely, as ESA-listed species do not typically have characteristics of invasive species, we have revised the regulations by adding a new subparagraph in § 17.81(b) to indicate that, when we are considering establishing an experimental population outside of historical range, we will analyze any adverse effects on the ecosystem into which the experimental population is being introduced.

Comment 16: A few commenters stated that, while narrow, there is an avenue in the current regulations for designating experimental populations outside their historical range. The commenters explained that such designations are necessarily limited and can occur only in "the

extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed." They further explained that this "extreme case" standard ensures a species is limited to its historical range unless and until there is a robust scientific evaluation of the species' primary habitat. The commenters asserted that, considering the profound and sometimes irreversible effect introduction can have on existing species, existing habitat, and human development, to name only a few, it is imperative that such evaluations occur in advance of any designation.

Response: Deleting the reference to "historical range" and removing the requirement that the species' primary habitat be destroyed is necessary to make the process of establishing experimental populations outside a species' historical range more flexible. With climate change and other threats, such as invasive species, increasingly becoming an issue for some species, it is likely that habitats will become unsuitable and such situations are no longer "extreme cases." These revisions will allow greater flexibility to act before primary habitats are destroyed and allow for more efficient and effective recovery efforts. For listed species whose recovery is threatened by factors such as these, we view experimental population establishment outside of their historical ranges as a potential tool for their management and conservation.

Comment 17: Commenters stated that giving the Service the ability to designate non-historical habitat for experimental endangered species populations will be misused by the agency and other nongovernmental organizations to unduly burden the energy and agricultural industries and force operators out of business.

Response: The process for designating an experimental population is rigorous, and we must go through a public notice and comment rulemaking process before deciding to establish an experimental population, whether within or outside historical range. During the process, we coordinate with State agencies, Tribal governments, local governments, industry groups, private landowners, and other entities that may be affected by the establishment of an experimental population.

Comment 18: One commenter stated that the reference to "affected private landowner," while already in the existing regulations, is unclear and should be further defined. The commenter asserted that private forest owners are looking for certainty and consistency in the application of rules and policies under the ESA, and the proposed rule should be explicit about with whom the Service will engage before drafting rules and when introducing populations into habitat outside of their historical range for conservation purposes. Further, the commenter urged the Service to provide a definitive and transparent framework for engagement and outreach to the affected private landowners.

Response: Determining with which entities we will collaborate will be important when we are contemplating proposing to establish an experimental population—whether within or outside historical range. With whom we engage will vary depending on the species and potential location of the experimental population. However, because we cannot anticipate in advance all potential stakeholders, the term "affected private landowners" is intentionally broad. Defining the term further could unintentionally exclude groups of landowners. Therefore, we are not further defining "affected private landowner."

Comment 19: Commenters suggested that the Service should establish experimental populations in areas where States and private partners are willing to develop innovative programs to make the reintroduced species an asset to neighboring landowners, rather than a liability. The commenters asserted that this could be done through, for instance, a pay-for-presence program that financially rewards landowners for the documented presence of the introduced species on their land.

Response: We support the goal of having a reintroduced experimental population be an asset to landowners, but we do not currently have the authorization or funding to establish a pay-for-presence program.

Comment 20: One commenter recommended that, instead of expanding the scope of section 10(j) experimental populations, the Service should evaluate use of non-ESA frameworks

under State wildlife management authority when contemplating potential introductions of ESA-protected species outside historical range. The commenter stated that the Service could develop more flexible management programs in cooperation with States, land management agencies, and private landowners that could avoid ESA regulatory burdens and associated risks and costs of litigation. The commenter further asserted that most importantly, such agreements would enhance local collaboration and control and increase the likelihood of social acceptance and, ultimately, long-term success of conservation translocations.

Response: We do work collaboratively with States and other agencies when considering whether to establish an experimental population and can craft species-specific rules that include only the take prohibitions necessary for the conservation of the species. When establishing an experimental population, we must follow the ESA and our regulations. Introduction of species under the authorities of section 10(j) allow for regulatory flexibilities by the establishment of a section 4(d) rule. A species introduced without a section 10(j) rule is subject to all the regulatory authorities of the ESA. In addition, we can collaboratively reintroduce populations of ESA-listed species without using the experimental population tool and could also use our Safe Harbor Agreement tool as a mechanism for reintroducing listed species.

Comment 21: One commenter indicated that it was of critical importance to assure the full coordination and cooperation between the Service and any affected States as an integral part of the experimental population establishment process, along with recognition that an affected State must agree to the proposed action.

Response: While we have not revised our regulations to include a requirement that the affected State(s) must agree to the proposed establishment of an experimental population, our full coordination with State agencies and all other affected entities when going through the process to establish an experimental population is extremely important and is reflected in our regulations (see § 17.81(e)).

Comment 22: One commenter stated that that the Service should work with Tribes to seek and incorporate Indigenous Traditional Ecological Knowledge (ITEK) into decisions relating to experimental populations as doing so will help produce better decisions.

Response: We have added Tribes into the regulations as an entity with whom we must coordinate (see § 17.81(e)). Our intent is to fully coordinate with any Tribes that may be affected by the establishment of an experimental population. We will also work with Tribes to gather ITEK when going through the experimental population establishment process.

Comment 23: A number of commenters stated that, given the increasing threats to many species within their historical ranges, recovery of those species may be increasingly dependent on the introduction of experimental populations. They stated that it is increasingly necessary for the Service to use the "essential" designation. The commenters further asserted that more generous use of the "essential" designation would allow the Service to designate critical habitat for experimental populations, which would be an important tool in addressing the increasing threats to habitat recognized in the proposed rule.

Response: Establishing experimental populations is one tool to help recover listed species. Our determination as to whether an experimental population is essential to the continued existence of the species is made on a species-by-species basis, considering the status of that species and the best available scientific and commercial information. We cannot predict in advance whether we will make essential determinations more frequently in the future.

Comment 24: One commenter suggested that we revise § 17.81(c)(2), the requirement to determine whether an "experimental population is, or is not, essential to the continued existence of the species in the wild," by adding "or in captivity, if the species is solely held in captivity."

Response: We did not include the proposed revision in this final rule because this concept is outside the scope of our proposal and the public did not have an opportunity to comment on it.

Comment 25: Several commenters supported the proposed revisions and noted that climate change poses new and growing threats to a myriad of species. The commenters asserted that many species, including threatened and endangered species with already limited habitat availability, must either adapt to rapidly shifting temperature and precipitation regimes or migrate at a pace commensurate with climatic changes to avoid extinction. They stated that species with low vagility or dispersal capability may not be able to keep up with such shifts and may be driven to extinction via this migration lag.

Response: Climate change poses threats to numerous species, the impacts of which we did not anticipate at the time we adopted these regulations in 1984. One reason we are revising our regulations is that we have since learned that the impact of climate change is causing, or is anticipated to cause, many species' suitable habitat to shift outside of their historical range. In these instances, having a tool that allows us to establish an experimental population outside of a species' historical range will help us better recover listed species.

Comment 26: One commenter stated that every regulation, every tool, and every policy the Service creates should be evaluated through the lens of section 2(c) of the ESA and the definition of "conservation." The commenter explained that if the action does not use "all methods and procedures which are necessary" to recover species, it should be revised, as the Service proposes to do here.

Response: Establishing experimental populations is one tool we can implement to support the recovery of listed species. We are revising our 10(j) regulations to reflect our determination that, in order to provide for the conservation of certain species, it may be increasingly necessary and appropriate to establish experimental populations outside of their historical range if the species' habitat has undergone, is undergoing, or is anticipated to undergo irreversible decline and is no longer capable of supporting the species due to threats such as climate change or invasive species. The commenter's views about how section 2(c) and the

definition of "conservation" should be broadly applied throughout our ESA program are beyond the scope of this rule.

Comment 27: A few commenters stated that the Service's proposed change is not only within its authority but is necessary to fulfill the purposes of the ESA and specifically section 10(j). They stated that threats including climate change, invasive species, and human stressors like development are increasingly degrading many species' ability to survive—let alone recover—within their historical ranges. In addition, a number of commenters supported the proposed regulatory revisions and stated that it is clear that the ESA did not foresee or address the potential ESA implementation problems that climate change would present. The commenters asserted that adapting the regulations to accommodate shifts in habitat due to climate change potentially has merit if the process is sufficiently rigorous to avoid unanticipated secondary effects.

Response: As stated in the preamble, in 1984, when our regulations pertaining to section 10(j) of the ESA were first written, climate change and invasive species were not recognized as the significant threats they are today. As an agency, we need to adapt our regulations and policies to address changing threats to species.

Comment 28: Several commenters stated that the Service should prioritize habitats near or adjacent to species' historical ranges where at all possible. They asserted that, when this is not possible, great effort should be taken to identify habitats that are clearly analogous to those in species' historical ranges for reintroduction efforts.

Response: We will prioritize habitats near or adjacent to species' historical ranges where possible, but we must ensure that the experimental population is geographically separate from other populations of the species. Furthermore, we will prioritize areas within the historical range if those areas are still capable of supporting the species and an experimental population. If climate change or other threats have made, or are likely to make, areas within historical range

incapable of supporting the species and an experimental population, we will then consider areas outside of the species' historical range.

Comment 29: Some commenters stated that the idea of "historical range" is no longer relevant in a modern conservation context. They asserted that the historical range of a species may no longer be meaningful because the historical climate and historical habitat in the historical range may no longer exist.

Response: Climate change and other threats are changing the habitats of many species and species' ranges continually change over time due to many factors, such that there may be no single reference point for a species' historical range. However, historical range still provides important context to understand a species' biological needs, ecological roles, and the factors that affect it. We will still use the concept of historical range within the context of designating experimental populations to determine when it may be appropriate to assess the potential for adverse effects of introducing a species outside its historical range to the receiving ecosystems.

Comment 30: Commenters stated that the Service did not address the longstanding policy considerations and interpretations of the ESA statutory provisions that underpinned the 1984 rulemaking. The commenters indicated that we did not acknowledge our prior determination in 1984 that the purposes and policies of the ESA prohibit the transplantation of listed species beyond their historical ranges and must reconcile this interpretation with the revisions we proposed.

Response: We acknowledge that our prior 1984 determination generally prohibits the transplantation of listed species beyond their historical range. However, when the 1984 regulations were developed, we were not aware of the potential impacts of climate change that could render habitat within a species' historical range unsuitable for the species. Also, when we developed the 1984 regulations, we reserved the ability in extreme situations for transplantations outside the historical range at §17.81(a) (see above Response to Comment 16). Through this rule change we are adjusting our regulatory authority to allow us to adequately respond to these

potential scenarios in circumstances where it may not be possible to recover a species within its historical range because of loss or alteration of some or all its suitable habitat. As noted above, this final rule is consistent with our statutory authority because the only applicable requirement for an experimental population is to be "wholly separate geographically from nonexperimental populations of the same species."

Comment 31: Several commenters believed the Service's analysis under the Regulatory Flexibility Act (RFA) and consideration of responsibilities under Executive Order (E.O.) 13132 is incorrect. The commenters also disagreed with our finding for E.O. 12630 that the proposed rule would not have significant takings implications and that a takings implication assessment is not warranted. They urged us to conduct such an assessment before finalizing the rule.

Response: Regarding E.O. 13132, the Service is the only entity that is directly affected by this rule as we are the only entity that would apply these regulations to designate experimental populations. This rule will further the goals of conservation and recovery of endangered species and threatened species. While serving to advance these legitimate government interests, this rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Regarding E.O. 12630, no external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule. Moreover, the rule change does not directly affect private property. It will not result in either a physical or regulatory taking because it will not present a barrier to all reasonable and expected beneficial uses of private property.

Finally, we note that designation of any experimental population would require a public notice-and-comment rulemaking process that would undergo individual review and analysis under the RFA and these Executive orders.

Comment 32: A few commenters stated that the Service attempts to avoid its obligations under the Unfunded Mandates Reform Act (UMRA) by failing to include local government in the development of its regulations and by failing to examine the impact of the proposed regulations on the operations of local government.

Response: The requirement to undertake an analysis under the UMRA applies only to regulations containing "Federal mandates" that meet the threshold levels under the Act. (2 U.S.C. 1532–1535.) The UMRA defines "Federal mandate" as a regulation that would impose either an enforceable duty upon State, local, or Tribal governments (Federal intergovernmental mandate) or an enforceable duty upon the private sector (Federal private sector mandate). (2 U.S.C. 658(5)–(7).) The regulatory changes in this final rule would not impose an enforceable duty on State, local, or Tribal governments, or the private sector. The only direct impact of this rule change is upon the Service because this rulemaking action pertains to the general requirements that apply when the Service exercises its authority to establish experimental populations. When the Service proposes to establish a specific experimental population, whether within or outside of historical range, we will undertake an analysis under the UMRA.

Comment 33: Some commenters asserted the need to conduct National Environmental Policy Act (NEPA) analysis on the regulation revision and that this rulemaking action should not be categorically excluded. They stated the Service is seeking to fast-track this revision by claiming a categorical exclusion under NEPA and disagreed with our finding. In particular, several commenters stated that the rule does not consider the economic and environmental harm of experimental populations that currently impact public land managers and the agriculture industry in Arizona.

Response: We have complied with NEPA by determining that the rule is covered by a categorical exclusion found at 43 CFR 46.210(i). We explained this determination in an Environmental Action Statement that is posted in the docket for this rule. This rule change sets out the overarching process and considerations that the Service undertakes when it designates an

experimental population, and this rulemaking action has no significant impacts on the human environment. When the Service proposes to establish an experimental population, the proposed action will be subject to the NEPA process at that time.

Comment 34: One commenter recommended a more significant investment in environmental review when considering introduction of a species beyond its historical range. The commenter asserted that such processes should go beyond the use of the typical environmental assessment (EA) and include the compilation of an environmental impact statement (EIS) to explore and solicit input on all possible alternative actions with stakeholders. The commenter further asserted that if introduction beyond a species' historical range is targeted as the preferred action, emphasis must be placed on understanding and planning for the potential cumulative and indirect impacts of such an action.

Response: When we propose to establish an experimental population beyond a species' historical range, we will undertake a thorough analysis under NEPA and decide whether to use a categorical exclusion, an EA, or an EIS.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that

the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is consistent with Executive Order 13563, and in particular with the requirement of retrospective analysis of existing rules, designed "to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 et seq.), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or that person's designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that this rule would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking revises and clarify requirements for the Service regarding factors for establishing experimental populations under the ESA. The changes to these regulations do not expand the reach of species protections.

The Service is the only entity that is directly affected by this rule because we are the only entity that would apply these regulations to designate experimental populations. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule. The future designation of any experimental

population would require a public notice and comment rulemaking process that would include a review under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the Regulatory Flexibility Act section above, this rule would not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this rule would not impose a cost of $100 million or more in any given year on local or State governments or private entities. A small government agency plan is not required. As explained above, small governments will not be affected because the rule will not place additional requirements on any city, county, or other local municipalities.

(b) This rule will not produce a Federal mandate on State, local, or Tribal governments or the private sector of $100 million or greater in any year; that is, this rule is not a "significant regulatory action"' under the Unfunded Mandates Reform Act. This rule does not impose any obligations on State, local, or Tribal governments.

Takings (E.O. 12630)

In accordance with Executive Order 12630, this rule does not have significant takings implications. This rule does not pertain to "taking" of private property interests, nor will it directly affect private property. A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This rule substantially advances a legitimate government interest (conservation and recovery of endangered species and threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this rule would have significant federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to designation of experimental populations under the ESA and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This rule clarifies factors for designation of experimental populations under the ESA.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," and the Department of the Interior's manual at 512 DM 2, we have considered possible effects of this rule on federally recognized Indian Tribes. We will continue to collaborate and coordinate with Tribes on issues related to federally listed species and their habitats. See Joint Secretary's Order 3206 ("American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," June 5, 1997). As discussed earlier in this document, we have revised the regulations to add a requirement for consultation with affected Tribal governments in developing and implementing experimental population rules. Any regulation promulgated pursuant to this section will, to the maximum extent practicable, represent an agreement between the Service, the affected State and Federal agencies, Tribal governments, local government agencies, and persons holding any interest in land or water that may be affected by the establishment of an experimental population.

Paperwork Reduction Act of 1995 (PRA)

This regulation revision does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the PRA (44 U.S.C. 3501 et

seq.). OMB has previously approved the information collection requirements associated with reporting requirements associated with experimental populations and assigned the following OMB Control Number: 1018–0095, "Endangered and Threatened Wildlife, Experimental Populations, 50 CFR 17.84" (expires 9/30/2023). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We analyzed this regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM 8).

We find that the categorical exclusion found at 43 CFR 46.210(i) applies to these regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case. When the Service proposes to establish an experimental population for a particular species, the proposed action will be subject to the NEPA process at that time.

Energy Supply, Distribution, or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. The revised regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no statement of energy effects is required.

References Cited

A complete list of all references cited in this rule is available upon request from the Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**) or online at *https://www.regulations.gov* in Docket No. FWS-HQ-ES-2021-0033.

Authority

We issue this rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 et seq.).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

For the reasons described above, we hereby amend subpart H, of part 17, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

2. Amend § 17.80 by revising paragraph (a) to read as follows:

§ 17.80 Definitions.

(a) The term *experimental population* means an introduced and/or designated population (including any offspring arising solely therefrom) that has been so designated in accordance with the procedures of this subpart but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species. Where part of an experimental population overlaps with nonexperimental populations of the same species on a particular occasion, but is wholly separate at other times, specimens of the experimental population will not be recognized as such while in the area of overlap. That is, experimental status will be recognized only outside the areas of overlap. Thus, such a population will be

treated as experimental only when the times of geographic separation are reasonably predictable, e.g., fixed migration patterns, natural or manmade barriers. A population is not treated as experimental if total separation will occur solely as a result of random and unpredictable events.

* * * * *

3. Amend § 17.81 by:

a. Revising paragraph (a), paragraph (b) introductory text, and paragraphs (b)(3) and (b)(4);

b. Removing the undesignated paragraph following paragraph (b)(4);

c. Adding paragraph (b)(5);

d. Revising paragraph (c)(3);

e. Redesignating paragraphs (d), (e), and (f) as paragraphs (e), (f), and (g);

f. Adding a new paragraph (d); and

g. Revising the newly designated paragraphs (e), (f), and (g).

The revisions and additions read as follows:

§ 17.81 Listing.

(a) The Secretary may designate as an experimental population a population of endangered or threatened species that will be released into habitat that is capable of supporting the experimental population outside the species' current range, subject to the further conditions specified in this section, provided that all designations of experimental populations must proceed by regulation adopted in accordance with 5 U.S.C. 553 and the requirements of this subpart.

(b) Before authorizing the release as an experimental population of any population (including eggs, propagules, or individuals) of an endangered or threatened species, and before authorizing any necessary transportation to conduct the release, the Secretary must find by regulation that such release will further the conservation of the species. In making such a finding, the Secretary will use the best scientific and commercial data available to consider:

* * * * *

(3) The relative effects that establishment of an experimental population will have on the recovery of the species;

(4) The extent to which the introduced experimental population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area; and

(5) When an experimental population is being established outside of its historical range, any possible adverse effects to the ecosystem that may result from the experimental population being established.

* * * * *

(c) * * *

(3) Management restrictions, protective measures, or other special management concerns of that population, as appropriate, which may include but are not limited to, measures to isolate, remove, and/or contain the experimental population designated in the regulation from nonexperimental populations; and

* * * * *

(d) The Secretary may issue a permit under section 10(a)(1)(A) of the Act, if appropriate under the standards set out in sections 10(d) and 10(j) of the Act, to allow actions necessary for the establishment and maintenance of an experimental population.

(e) The Service will consult with appropriate State fish and wildlife agencies, affected Tribal governments, local governmental agencies, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. When appropriate, a public meeting will be conducted with interested members of the public. Any regulation promulgated pursuant to this section will, to the maximum extent practicable, represent an agreement between the Service, the affected State and Federal agencies, Tribal governments, local government agencies, and persons holding any interest in land or water that

may be affected by the establishment of an experimental population.

(f) Any population of an endangered species or a threatened species determined by the Secretary to be an experimental population in accordance with this subpart will be identified by a species-specific rule in §§ 17.84 and 17.85 as appropriate and separately listed in § 17.11(h) (wildlife) or § 17.12(h) (plants) as appropriate.

(g) The Secretary may designate critical habitat as defined in section (3)(5)(A) of the Act for an essential experimental population as determined pursuant to paragraph (c)(2) of this section. Any designation of critical habitat for an essential experimental population will be made in accordance with section 4 of the Act. No designation of critical habitat will be made for nonessential experimental populations.

4. Revise § 17.82 to read as follows:

§ 17.82 Prohibitions.

Any population determined by the Secretary to be an experimental population will be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act with respect to such population. The species-specific rules (protective regulations) adopted for an experimental population under § 17.81 will contain applicable prohibitions, as appropriate, and exceptions for that population.

5. Amend § 17.83 by revising paragraph (b) and adding paragraph (c) to read as follows:

§ 17.83 Interagency cooperation.

* * * * *

(b) For a listed species, any experimental population that, pursuant to § 17.81(c)(2), has been determined to be essential to the survival of the species or that occurs within the National Park System or the National Wildlife Refuge System, as now or hereafter constituted, will be treated for purposes of section 7 of the Act as a threatened species.

(c) For purposes of section 7 of the Act, any consultation or conference on a proposed Federal action will treat any experimental and nonexperimental populations as a single listed

species for the purposes of conducting the analyses and making agency determinations pursuant to section 7(a) of the Act.

6. Amend § 17.84 by:

a. Revising the section heading; and

b. In paragraphs (l)(1), (l)(16), and (x)(8) remove the word “special” wherever it appears.

The revision reads as follows:

§ 17.84 Species-specific rules—vertebrates.

* * * * *

7. Amend § 17.85 by revising the section heading and paragraph (a)(2)(i) to read as follows:

§ 17.85 Species-specific rules—invertebrates.

(a) * * *

(2) * * *

(i) Except as expressly allowed in the rule in this paragraph (a), all the prohibitions of § 17.31(a) and (b) apply to the mollusks identified in the rule in this paragraph (a).

* * * * *

§ 17.86 [Removed and Reserved]

8. Remove and reserve § 17.86

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

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